screaming as well, and it strikes me as being most extraordinary that in a busy establishment such as this, no one should have heard it. However, that is the position as it emerges from the magistrate's notes and short of any further evidence which could connect these appellants with those serious injuries as found by Sister Gavin, I find it impossible to uphold the conviction. In his grounds the magistrate expressly states that he disbelieves that the inmate attacked the 1st appellant, and no doubt he discounted the evidence of all the appellants, as he was thoroughly entitled to do. But, after all, it was not for them to satisfy him of their innocence, but for the prosecution to satisfy him of their guilt, and this in my opinion they failed to do. He says that none of them made any attempt to report the matter to anyone in authority. But why should they, if they were only doing that which was an every day occurrence? Again he says they simply left her alone on the floor of the ward suffering from physical injuries and severe mental disorder. But where is the evidence of this? They were last seen pushing her along a passage, and nearly 6 hours later she was found in a ward, on the floor and in distress. There is a complete mystery as to what happened during those 6 hours, wherein she seems to have disappeared from all supervision, and to have sustained considerable harm. If there was any misconduct on the part of these appellants, in so far as they may have committed some breach of hospital regulations, then such misconduct cannot be said to be in the least connected with the inmate's subsequent suffering, and it was laid down in *Regina v. Pelham*[1] that such connection is essential to a charge of ill-treatment.

For these reasons I allow this appeal and direct a verdict of acquittal to be entered.

Appeal allowed.

K. SOCKALINGA MUDALIAR v. S. ELIATHAMBY & ANOR.

[Court of Appeal (Mathew, C.J., Pretheroe and Thomson, JJ.) March 15, 1952]

[Ipoh — F.M. Civil Appeal No. 62 of 1951]

Japanese Judgments and Civil Proceedings Ordinance, s. 4 — Pre-Occupation promissory note — Suit instituted during the Japanese occupation but not proceeded with — Application for extention of term refused and action dismissed — Fresh suit instituted — Res judicata — Civil Procedure Code, s. 5.

In 1942, during the Japanese occupation of Malaya, the appellant instituted proceedings against the respondents on a promissory note made before the war; nothing further was done beyond the filing of the suit. After the liberation the appellant applied in 1947 for leave to carry on the proceedings of the Japanese Court under section 4 of the Japanese Judgments and Civil Proceedings Ordinance 1946; the application was dismissed on the ground that the Moratorium Proclamation was in force. The Proclamation was repealed as from 1st October, 1949 and in March 1950 the appellant applied for an extension of time to make a further application under the Japanese Judgments and Civil Proceedings Ordinance for leave to carry on the Japanese proceedings This was dismissed on the ground that the affidavit in support did not reveal any special grounds justifying the grant of extension. In May 1950 the appellant brought the present action based on the same cause of action as he had sued on in the Japanese Court. The suit was dismissed on the ground that as the appellant had elected to seek his remedy by attempting to carry on the Japanese proceedings he was not at liberty to take any other proceedings.

Held on appeal, that as the Japanese proceedings had never been heard nor finally decided there was no question of **res judicata** nor was there any withdrawal of them so as to preclude the institution of a fresh suit in respect of the same subject matter. Nevertheless, the appellant was not precluded by statute to bring the present suit, the true effect of section 5 of the Civil Procedure Code being not to preclude him from such an action but to prevent the Court from proceeding with the trial; the Court could, however, stay all proceedings until the Japanese proceedings had been determined. But at the date of the trial, the Japanese Court being dead, the Japanese proceedings were no longer pending and the appeal must be allowed.

COURT OF APPEAL.

R. D. Hume and *K. C. Chan* for the appellant.

M. S. Mahendran for the respondents.

Cur. Adv. Vult.

Thomson, J. : — To appreciate the question at issue in this appeal it will be desirable to set out the course of the litigation between the parties.

On 2nd November, 1942, during the Japanese occupation, the appellant instituted proceedings against the respondents in the Japanese Court on a pre-occupation promissory note dated 2nd November, 1939. A plaint was filed and summonses were issued but apparently no further steps were taken during the occupation.

On 10th February, 1947, the appellant applied by way of originating summons for leave to carry on the proceedings which he had commenced in the Japanese Court as proceedings in this Court in accordance with section 4 of the Japanese Judgments and Civil Proceedings Ordinance, 1946. That application was dismissed, apparently for the reason, which may or may

not have been justified, that the Moratorium Proclamation was still in force. On 24th March, 1950, the Moratorium being at an end as from 1st October, 1949, the appellant who was by that time out of time applied for an extension of time to make a further application under section 4 of the Japanese Judgments Ordinance for leave to carry on the Japanese proceedings. That application was dismissed on 15th May, 1950, on the ground that his affidavit in support of it did not reveal any special grounds justifying the grant of an extension of time.

On 23rd May, 1950, the appellant commenced the present suit against the respondents in which he sued on the same cause of action as he had sued on in the proceedings he had instituted in the Japanese Court.

When this present suit came on for trial, which was on 21st September, 1951, Counsel for the present respondents took the preliminary objection that the appellant had elected to seek his remedy by attempting to carry on the proceedings in the Japanese Court by virtue of the provisions of the Japanese Judgments Ordinance and that having failed to do so he was not then at liberty to take any other proceedings. The trial Judge agreed with this submission on the part of Counsel and accordingly made an order dismissing the plaintiff's claim with costs.

Against that Order the appellant has now appealed.

In my opinion the appeal is to be decided on a consideration of the relevant sections of the Civil Procedure Code.

There was no question, and indeed this was conceded by Counsel for the respondents, of *res judicata* arising in connection with the Japanese proceedings for in these proceedings the issue between the parties was neither heard nor finally decided (Civil Procedure Code — section 6). Nor was there any withdrawal of the Japanese suit which might have precluded the institution of a fresh suit in respect of the same subject matter by reason of section 362 of the Code, for far from withdrawing the Japanese suit the appellant had made at least two attempts to continue it which were unsuccessful only for reasons entirely unconnected with its merits. The case therefore fails to be considered under section 5 of the Code the material portions of which read as follows :—

"5. .....no Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit for the same relief between the same parties..... pending in the same or any other Court,.....having jurisdiction to grant such relief."

That, so far as I have been able to advise myself, is the only provision in the Code or indeed in any other local statute that has any bearing on the appellant's right to institute and carry on the present suit and it will be convenient to consider its effect in two stages.

In the first place, I would observe that it does not preclude a plaintiff from commencing a second suit while a previous suit in respect of the same cause of action is still pending for what it says is that "no Court shall proceed with the trial" of any such suit. If, therefore, in the present case the Japanese suit were regarded as still pending the proper course would have been not to dismiss the second suit but to make an order staying all proceedings upon it until the Japanese suit was disposed of.

In the second place, it follows from the wording of the section that the material date for the purposes of secttion 5 is the date on which the Court has to decide whether or not it will proceed with the trial which in the present case was 21st September, 1951, and in my opinion on that date the Japanese suit could not be said to be any longer pending. In that connection I would adopt the following passage from *Stroud's Judicial Dictionary* (2nd Edition, page 1445) :—

"A legal proceeding is "pending" as soon as commenced.....and until it is concluded, i.e. so long as the Court having original cognizance of it can make an order on the matters in issue, or to be dealt with, therein."

On 21st September, 1951, no Court could possibly make any order in any way affecting any of the matters in issue in the Japanese suit. The Japanese Court was dead. As far as this Court was concerned, the appellant was out of time to take advantage of section 4 of the Japanese Judgments Ordinance, his application for an extension of time to take advantage of the section had been refused and he was out of time for appealing against the refusal of extension of time. The word 'pending' is derived from the latin word *pendere,* to hang, and on 21st September, 1951, the Japanese suit was not hanging over anybody. In the circumstances, therefore, I can see no reason why, subject to limitation which was not raised either in the Court below or here the appellant should not have commenced the present suit. It may well be that at some stage of the proceedings the pleadings could have been amended to enable the respondents to raise

the issue of limitation and it may well be had that issue been raised the respondents might have been successful upon it. That, however, is entirely beside the point for the proceedings were never allowed to reach the stage where limitation might have been raised.

I would allow the appeal and would make an order in accordance with section 553 of the Code that the Court below do proceed to determine the suit.

As regards costs, the appellant should have the costs of this appeal and his deposit should be paid out to him.

Mathew, C.J. : — I agree with the judgment of Thomson, J. which I have had the advantage of reading and have nothing to add.

Pretheroe, J. : — I have had the advantage of reading the judgment proposed by Thomson, J. I agree with the decision he has arrived at and also with his reasoning. I would make an order in similar terms.

Appeal allowed.

TAN AH CHOEW v. PUBLIC PROSECUTOR.

[Rev. Crim. Juris. (Abbott, J.) March 15, 1952]

[Malacca — Criminal Revision No. 1 of 1952]

Hire purchase agreeement — Illegal pawning — Pawn Brokers Ordinance, s. 30(1) — Jurisdiction of Magistrate — Criminal Procedure Code, s. 435(1).

A and B enter into a hire purchase agreement whereby A hires out a bicycle to B; until such time as all instalments are paid the bicycle is to remain the property of A but will be in B's possession. On the day the agreement is signed B, without the consent or authority of A, pawns the bicycle with C, a pawnbroker. B is charged before a magistrate with criminal breach of trust but is acquitted; the magistrate orders the bicycle be handed over to C.

Held, that section 435(1) of the Criminal Procedure Code is not limited to the particular offence with which an accused is charged and where there is evidence of some offence having been committed, in this case an illegal pawning contrary to section 30(1) of the Pawn Brokers Ordinance, the magistrate has jurisdiction to order that the bicycle be restored to its rightful owner.

CRIMINAL REVISION.

P. Hall for the petitioner.

C. S. Jayaswal for the pawn broker.

Cur. Adv. Vult.

Abbott, J.: — This case has come before this Court upon a petition for revision presented by one Tan Ah Cheow who is a bicycle dealer in Malacca. On the 4th of September 1951 the petitioner entered into a hire purchase agreement for the sale of a bicycle with one Tan Sam Boon. The hire purchase agreement provided that the bicycle should remain the property of Tan Ah Cheow until such time as the instalments were paid in full. It further provided that the hirer should retain the bicycle in his own possession. The hirer paid a deposit and on the very day that he signed the hire purchase agreement he pawned the bicycle. He was charged before the Magistrate at Malacca with criminal breach of trust, and for reasons which appear to me to be somewhat obscure, he was acquitted. Following upon the acquittal the Magistrate gave an order that the bicycle, which was an exhibit in the case, be handed over to the pawn broker. Tan Ah Cheow has petitioned for a reversal of that order and his learned counsel has informed this Court that the Magistrate's order has caused grave anxiety among cycle dealers in the Settlement. I am not surprised. Section 435 of the Criminal Procedure Code governs the making of orders for disposal of property regarding which an offence has been committed. By the implications of the Magistrate's decision the hirer did not commit the offence with which he was charged and therefore, at first sight, it would seem that the Magistrate was without jurisdiction to apply sub-section (1) of that section, but shorn of unnecessary words for the purposes of this decision that sub-section reads as follows :—

"At the conclusion of any trial in any criminal court the court may make such order as it thinks fit for the disposal of any property produced before it regarding which any offence appears to have been committed."

The sub-section is not limited to the particular offence with which the accused was charged. In this particular case it is clear from the evidence that an offence, other than that with which the accused was charged, was committed — namely, the offence of illegal pawning contrary to sub-section (1) of section 30 of the Pawn Brokers Ordinance, Cap. 216 in that the accused had knowingly pawned the property of Tan Ah Cheow without the latter's authority. The proper order for the Magistrate to have made was that the bicycle should be restored to its rightful owner, namely, Tan Ah Cheow and this Court so orders.

Order accordingly.